76

(3)

No. 07-569

FILED
DEC 12 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

JERRY FITCH, SR.,

Petitioner,

v.

JOHNNY VALENTINE,

Respondent.

On Petition For A Writ Of Certiorari To The Mississippi Supreme Court

REBUTTAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DION J. SHANLEY
Counsel of Record
HICKMAN, GOZA & SPRAGINS
115 Homestead Drive
Madison, MS 39110
(601) 853-1774
(601) 898-4537 facsimile

SHELBY DUKE GOZA
Of Counsel
HICKMAN, GOZA & SPRAGINS
1305 Madison Avenue
Oxford, MS 39567
(662) 234-4000
(662) 234-2000 facsimile

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

REBUTTAL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jerry Fitch, Sr., respectfully submits this Rebuttal to Respondent's Brief in Opposition to his Petition for a Writ of Certiorari to review the judgment of the Mississippi Supreme Court in this case.

INTRODUCTION

Respondent's defense of Mississippi's alienation of affection tort, a common law remedy adorned with the imprimatur of public policy and settled practice, is largely beside the point. Petitioner is not asking this Court to drag Mississippi into the twenty-first century through the expedient of review.

"Malicious adultery," the vehicle by which Respondent was awarded over one hundred and twenty thousand dollars,[1] has no reference in the settled law of any jurisdiction, nor even Mississippi. Assuming one can even accomplish such a thing absent assault, it bears pointing out that Mississippi does not even recognize such a "tort." *Saunders v. Alford*, 607 So. 2d

[1] Respondent acknowledges that the jury had already awarded over six hundred thousand dollars in "actual damages" prior to moving to the punitive damage stage. Obviously, the exemplary damage verdict can only be explained by inferring that the jury believed that, in this bifurcated action, their job was accomplished at a prior decisional stage.

1214, 1214 (Miss. 1992) (en banc) (abolishing tort of criminal conversation).[2]

Waiver or exhaustion is not an issue here once the proper scope of this appeal is understood. Petitioner raised the question of punishment for the exercise of his constitutional rights at all stages in the proceedings below, but, in any event, the highest tribunal in Mississippi properly reviewed those challenges in the course of deciding the case on its merits, whether articulated precisely or not. *Brooks v. State*, 209 Miss. 150, 46 So.2d 94 (1950) (Errors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal).

Ultimately, Respondent's submission points out the pressing need for this Court to provide guidance after *Lawrence*, of the functional parameters of the constitutional rights of privacy and association within the context of consensual intimate relationships disproved by majoritarian consensus.

Courts throughout this country continue to myopically concentrate on the sexual act involved, deriving a rule of decision from the vacuum of inadequate

---

[2] That Mississippi continues to criminally proscribe habitual adultery (Miss. Code Ann. § 97-29-1) is also a *non sequitur*. Punishment here was imposed by a civil jury which had already predicated its enormous damage verdict on the intimate association here at issue.

precedent while ignoring the complexities of the human relationships giving rise to the issue.

Petitioner, punished for engaging in consensual sex with his current wife while she was married to another (and former adulterer), seeks the opportunity from this Court for a reasoned approach to the human rights at issue.[3] His predicament is one faced by countless black-mailed others every day in this country. The punishment for "malicious adultery" imposed by a jury enabled by the state, while typically avoided by others less bold, is unconstitutional.

I. Petitioner Is Not Asking The Court To Declare A Constitutionally Protected Right To Commit Adultery

Respondent's reliance on *Caruso v. City of Cocoa*, 260 F. Supp. 1191 (M.D. Fla. 2003) does not support a

---

[3] The court in *Bowers* focused primarily on the sexual act at issue rather than other aspects of the consensual relationship. Reference the analytical approach of the court in *Caruso v. City of Cocoa*, 260 F. Supp. 1191 (M.D. Fla. 2003), crucially important to Respondent. Yet, for all that, there remains hope that the judiciary is moving to the proper level of abstraction, consistent with any useful inquiry into the concerns and countervailing considerations involved in litigation over fundamental rights within this arena. *Compare Lawrence v. Texas*, 539 U.S. 558 (2003) and *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983) with *Smith v. Price*, 616 F.2d 1371 (5th Cir. 1980) (assuming "for purposes of this discussion that the [extramarital] relationship itself was constitutionally protected"). *See also Shumpert v. City of Fulton*, 1995 WL 1945434 (N.D. Miss.).

conclusion that the Court should not consider this case. First, the Court is, of course, not bound by this decision of a district court in Florida. Second, *Caruso* was decided before *Lawrence* and therefore district court was not bound by that decision. And as Respondent points out, neither case addresses the particular rights raised in this case. Therefore, if anything, Respondent's argument only serves to highlight the need for this Court to provide further guidance as to the constitutionality of punishment for "malicious adultery" in light of *Lawrence* and its antecedents.[4]

In addition, Respondent's argument that *Caruso* is a natural extension of *Lawrence* because the Middle District of Florida applied the historical analysis that the Supreme Court applied to laws directed at homosexual conduct to the laws directed at adultery is simply irrelevant. Petitioner is not seeking to obtain this Court's approval of adultery or even to declare unconstitutional any laws that discourage it. He is simply challenging the state's right to punish certain conduct.

---

[4] Respondent's argument that the imposition of punitive damages in this case was lawful because prior Mississippi cases – specifically the 1969 Mississippi Supreme Court case cited by Respondent – have affirmed the imposition of punitive damages for alienation of affection is simply irrelevant. The issue at hand is the *constitutionality* of the imposition of punitive damages for "malicious adultery" has never been addressed in any case cited by Respondent, let alone by this Court.

II. The Relief Sought Would Not Interfere With Mississippi's Interest In Protecting The Institution Of Marriage

Respondent paints an exaggerated and illogical picture of what *might* occur if the Court were to hear this case and reverse the Mississippi Supreme Court's award of punitive damages for alienation of affections. First, Petitioner is seeking a holding that would only declare the Mississippi courts' award of punitive damages for commission of the tort of alienation of affections unconstitutional, not the tort itself. Therefore, there is no danger that a decision in this case would result in the abolition of adultery as a grounds for divorce. Indeed, there are other accepted grounds for divorce, such as impotence and insanity, that do not support the imposition of punitive damages. *See, e.g.*, Miss. Code Ann. § 93-5-1 through 7.

CONCLUSION

For the reasons set forth herein and in Petitioner's Petition for a writ of certiorari, the Court should grant Petitioner a writ of certiorari so that it may consider the question of whether the state of Mississippi, through the guise of its antiquated tort of alienation of affections, can punish a person for engaging in consensual intimate association without

violating his First and Fourteenth Amendment rights.

Respectfully submitted,

DION J. SHANLEY
Counsel of Record
HICKMAN, GOZA & SPRAGINS
115 Homestead Drive
Madison, MS 39110

SHELBY DUKE GOZA
Of Counsel
HICKMAN, GOZA & SPRAGINS
1305 Madison Avenue
Oxford, MS 39567